Supreme Court, U.S.
FILED
MAY 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-614

In The
Supreme Court of the United States
October Term, 1987

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC.,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

I

Is the Indiana criminal RICO statute (I.C. 35-45-6-1 *et seq.*, the Indiana Corrupt Business Influence Act) as applied to obscenity offenses unconstitutionally vague in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

Does the use of obscenity or an obscenity related offense, other than child pornography, as a predicate offense of the Indiana RICO statute violate the First Amendment to the Constitution of the United States?

II

Is Indiana's criminal RICO statute violative of the First and Fourteenth Amendments to the Constitution of the United States to the extent that it allows prosecution for criminal RICO on the basis of two or more allegations of obscenity violations which have not been reduced to convictions?

III

Are the first amendment procedural safeguards of *Heller v. New York*, 413 U.S. 483 (1973) violated by a state law which allows the arrest and prosecution of an individual for crimnial RICO based upon predicate allegations of obscenity violations, not reduced to conviction, without allowing, post-arrest, a prompt adversary hearing to determine the probable obscenity of items upon which the prosecution is based?

LIST OF PARTIES

All parties appear in the caption of this case in this Court. There are no parent, subsidiary or affiliated companies of the corporate parties.

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The decision of the Indiana Court of Appeals, First District, published at 505 N.E.2d 504 (1987) appears in the Appendix hereto. (Consolidated Joint Appendix 176, hereinafter referred to as "J.A."). A timely petition for rehearing was filed and denied without opinion. (J.A. 182). A timely petition for transfer was filed with the Supreme Court of Indiana and was denied without opinion. (J.A. 183).

JURISDICTION

The decision of the Indiana Court of Appeals was entered on March 31, 1987. A timely petition for rehearing was filed and denied on May 15, 1987. A petition for discretionary transfer was timely filed with the Indiana Supreme Court and denied on August 17, 1987. The Petition for Certiorari was filed within sixty days of that date, on October 14, 1987, as required by 28 U.S.C. § 2101(d) and Rule 20 (1) of this Court, and granted on March 7, 1988. The Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

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CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides in pertinent part: **"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."**

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part: **"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."**

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that: **"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

STATUTES INVOLVED

The pertinent sections of the Indiana Code are as follows:

Chapter 6. Racketeer Influenced and Corrupt Organizations

35-45-6-1 Definitions

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1, a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a Class C felony (IC 35-42-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-

1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); official misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). As added by Acts 1980, P.L.199, SEC.2. Amended by P.L.190-1984, SEC.1.

35-45-6-2 Corrupt business influence

Sec. 2. (a) A person:

(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly; an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony. As added by Acts 1980, P.L.199,SEC.2.

Chapter 30.5. Civil Remedies for Racketeering Activity.

34-4-30.5-1 Definitions

Sec. 1. As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) is the object of corrupt business influence (IC 35-45-6-2); or

(2) has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. As amended by P.L.308-1985, SEC.1.

34-4-30.5-2 Injunctive relief from corrupt business influence; action by prosecuting attorney

Sec. 2 The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) order a defendant to divest himself of any interest in any enterprise or real property;

(2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon

finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. As added by Acts 1980, P.L.199, SEC.1.

34-4-30.5-3 Action for forfeiture of property incident to corrupt business influence; orders for forfeiture and seizure

Sec. 3. (a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have prop-

erty subject to forfeiture seized by law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a vio'ation of IC 35-45-6-2 involving the property in question has occurred. As added by Acts 1980, P.L.199, SEC.1.

34-4-30.5-4 Seizure of property subject to forfeiture; requisites; custody; limitation of actions

Sec. 4. (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) the seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter;

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) place the property under seal;

(2) remove the property to a place designated by the court; or

(3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to replevin, but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 of this chapter. If an action is not filed within 180 days after the date of seizure, the law enforcement agency whose

officer made the seizure shall return the property to its owner. As added by Acts 1980, P.L.199, SEC.1.

34-4-30.5-5 Injunctive relief and damages from corrupt business influence; actions by aggrieved persons; jury trial, right to forfeited property; state as aggrieved person

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of a corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) an amount equal to three (3) times his actual damages;

(2) the costs of the action;

(3) a reasonable attorney's fee; and

(4) any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. As amended by P.L.308-1985, SEC.2.

34-4-30.5-6 Collateral estoppel; criminal proceeding

Sec. 6. In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. As added by Acts 1980, P.L.199, SEC.1.

ARTICLE 49 OBSCENITY AND PORNOGRAPHY

Chapter 2. General Provisions.

35-49-2-4 Adversary hearing; application for; preliminary determination

Sec. 4. (a) Within ten (10) days after:

(1) matter is obtained by seizure or by purchase under this article; or

(2) the defendant is arrested under this article;

whichever is later, and before trial, the state, the defendant, an owner, or any other party in interest of any matter seized or purchased may apply for and obtain a prompt adversary hearing for the purpose described in subsection(b).

(b) At the adversary hearing, the court shall make a preliminary determination of whether the matter is:

(1) probably obscene; or

(2) probably harmful to minors;

As added by P.L.311-1983, SEC.33.

STATEMENT OF THE CASE

Commencing in October, 1984 and thereafter until December 3, 1984, officers of the Howard County, Indiana Sheriff's Department purchased magazines at two stores owned by the corporate petitioners and allegedly controlled by Ronald and Connie Sappenfield. (R. 5-15). (Petitioners are hereinafter referred to as "petitioner" or "Sappenfield.") No notice was given to the stores that these purchases had been made or that there was a question concerning the propriety of the magazines purchased.

On April 8, 1985, charges were filed against the two Sappenfields and the two corporate defendants. The charges alleged six (6) separate violations of IC 35-49-3-1 (Sale or distribution of obscene matter,) class A misdemeanors, and two counts of corrupt business influence (RICO), class C felonies.[1]

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[1]Under Indiana law, the misdemeanors carry penalties of up to one (1) year imprisonment and a $5000 fine (IC 35-50-3-2). Class C felonies carry a presumptive term of imprisonment of five (5) years which can be increased to eight (8) years or reduced to two (2) years and fines of up to $10,000 (IC 35-50-2-6).

Pursuant to Indiana law, an ex parte probable cause submission had been made by the prosecutor. (R. 16-275). Besides the magazines, the prosecutor submitted statements of Officer Gordon Tocco reflecting the purchase of the magazines (R. 17-23), and the certificates of incorporation which reflected the Sappenfields' positions as directors and incorporators (R. 24-48). Also submitted were statements of three individuals; Jerry Fiscus (R. 49-53), Jean Porter (R. 54-57), and Linden Hill (R. 58-62). Each of these individuals described the length of his or her residence in Howard County and his or her current employment. Each rendered an opinion that the magazines appealed to the prurient interest in sex; depicted sexual conduct in a patently offensive way; and lacked serious literary, artistic, political, or social value. Ronald Sappenfield was thereafter arrested and released on bond. (R. 277, 278). Although she was initially charged, Connie Sappenfield, the former wife of Ronald W. Sappenfield, was never arrested. Charges against her were dismissed on September 19, 1985.

On June 4, 1985, petitioner moved to dismiss the RICO charges alleging that the RICO statute, as applied to obscenity offenses, violated both Federal and state constitutional law in various respects (R. 288-301, J.A. 150-167). Petitioner alleged that the RICO statute was unconstitutional in that it was unlawfully vague and overbroad, denied procedural due process in the context of obscenity, and had an impermissible chilling effect upon the exercise of first amendment rights. Sappenfield specifically alleged violations of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

On September 18, 1985, the Howard County Superior Court, Division 1, the Honorable Dennis H. Parry, Judge,

found that the RICO statute could not be constitutionally applied to violations of Indiana's obscenity statute. The court held that the Indiana RICO statute, as applied to obscenity, is unlawfully vague (R. 367, 368, J.A. 173-175). The trial court did not reach the merits of petitioners' additional reasons that RICO, as applied to obscenity, is unconstitutional.

The State appealed the trial court's decision to the Indiana Court of Appeals which reversed the trial court based upon the Indiana Supreme Court's decision in *4447 Corporation v. Goldsmith* and *Ft. Wayne Books, Inc. v. Indiana,* 504 N.E.2d 559 (Ind. 1987) (No. 87-470 in this Court).

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SUMMARY OF THE ARGUMENT

A) The constitutionality of the RICO statute as applied to obscenity must be determined on the basis of its impact upon first amendment rights. This requires utilization of the higher standard of review used by the Court when considering the impact of a particular law upon freedom of speech. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176 (1981); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 67 (1963).

B) The challenged statutes have a constitutionally significant chilling effect upon the exercise of first amendment rights due to their broad sweep, vagueness, and draconian sanctions. This chilling effect far outweighs any alleged justifications offered in support of the statute.

C) Obscenity cannot constitutionally be a predicate offense of RICO because of the conceptual differences between obscenity and crimes such as theft, dealing in drugs, and murder. Given the conceptual and qualitative differences, the Indiana RICO law, as presently formulated using obscenity as a predicate offense, does not have the requisite sensitivity to first amendment interests.

Merely labeling speech "racketeering" does not deprive it of its protected status, *DeJonge v. Oregon*, 299 U.S. 916 (1936), and is not adequate justification to allow the use of the unprecedented sanctions of RICO, against those who deal in communicative material.

D) The Indiana RICO statute is unconstitutionally vague and overbroad as applied to obscenity for the following reasons:

(1) The inherent vagueness of the *Miller* standard contributes to the overall vagueness and overbreadth of RICO as applied to obscenity.

(2) The concept that the manner or place of display can be a legitimate part of the obscenity decision as allowed by the Indiana Supreme Court contributes to the vagueness and overbreadth of RICO as applied to obscenity.

(3) The RICO statute, as applied to obscenity is vague and overbroad because of the enormous sweep of the statute and the fact that it makes criminal, ordinary everyday transactions in completely lawful businesses which happen to cross that "dim line

between protected and unprotected speech." This sweep has an unprecedented chilling effect.

(4) The reduced scienter requirement contemplated by the courts in obscenity prosecutions contributes significantly to the vagueness and overbreadth of RICO as applied to obscenity.

(5) The minimal concept of "participation" in a RICO "enterprise" contributes to the unconstitutional overbreadth, and resulting chilling effect of RICO as applied to obscenity.

E) If RICO can be constitutionally applied to obscenity, then the unusual nature of the *Miller* standard requires that the predicate acts be violations which have occurred in the trial court's jurisdiction and which have been properly reduced to convictions. The alleged violations must arise successively, i.e., the second act must be after the first conviction.

F) If RICO can be constitutionally applied to obscenity, the procedures utilized must contain substantial safeguards against abuse of first amendment rights. Minimally, there must be provision for a prompt, full, adversary hearing focusing upon the alleged obscenity of items constituting the alleged predicate acts. This hearing must use a standard of review which will protect against improper abuses of RICO and the resulting impact upon first amendment rights.

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ARGUMENT

I

THE EFFECT OF THE RICO STATUTE, USING OBSCENITY AS A PREDICATE OFFENSE MUST BE ANALYZED IN CONSIDERATION OF THE IMPACT UPON FIRST AMENDMENT RIGHTS.

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), this Court held that: " . . . the standard of review is determined by the nature of the right assertedly threatened or violated rather than the power being exercised . . . *Thomas v. Collins*, 323 U.S. 516, 529-530, 65 S.Ct. 315, 322, 89 L.Ed. 430 (1945)." When the right assertedly threatened is protected speech, this Court has not deviated from that concept. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172 (1986).[2] In *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987) (No. 87-470 in this Court), the Indiana Supreme Court refused to consider the first amendment impact of RICO as applied to

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[2]*Arcara* dealt with the closing of a bookstore because of illegal, non-communicative activities which took place therein. However, as Justice O'Connor noted:

"I agree that the Court of Appeals erred in applying a First Amendment standard of review where, as here, the government is regulating neither speech nor an incidental, non-expressive effect of speech. Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment. If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172, 3178 (1986) (O'Connor, J., concurring).

obscenity. Rather, the court considered only the alleged legislative justification.[3]

Petitioner requests the court to consider not only the alleged justification for applying RICO to obscenity allegations but the more practical, real impact upon first amendment rights.

The justification advanced by the State to support the application of RICO to obscenity is the need for new weapons of unprecedented scope for an assault on organized crime. *4447 Corporation, supra,* at 564, citing *Russello v. United States,* 464 U.S. 16, 26 (1983). If this justification exists as to obscenity violations, which Sappenfield disputes, it is outweighed by the more important freedom of speech guaranteed by the first amendment.

This Court has consistently held that criminal statutes prosecuting obscenity and the punishment thereof must be "carefully limited." *Miller v. California,* 413 U.S. 15, 23-24 (1973); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 682-685 (1968). The Court has held that criminal and civil sanctions must not sweep so broadly that they create a chilling effect which would curtail the availability of non-obscene literature due to self-censorship. *Smith v. California,* 361 U.S. 147 (1959); *Miller, supra.*

In *Bantam Books, Inc. v. Sullivan,* 372 U.S. at 66, this Court said:

> "... a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without re-

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[3]Although the Indiana Supreme Court did not specifically state that it was only considering the legislative justification for applying RICO to obscenity, a review of the opinion reveals that this in fact is what occurred.

> gard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 730-731, 81 S.Ct. 1708, 1715, 1716, 6 L.Ed.2d 1127.
>
> Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. People of the State of California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205; *Marcus v. Search Warrant, supra*, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.

The challenged statute has a draconian impact due to its vagueness, its broad sweep and the contemplated pre- and post-indictment seizure of assets, post-conviction forfeiture,[4] and harsh prison sentences.

A prosecutor believing a particular movie, book, or magazine to be obscene could charge RICO based upon the accusation that the movie was shown on two separate oc-

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[4]IC 34-4-30.5-6 provides that any issues determined in a criminal proceeding may not be relitigated in any civil proceedings. Therefore, a conviction and perhaps even a finding of probable cause conclusively establishes virtually all of the proof necessary to forfeit assets. Moreover, even if the prosecuting attorney refrains from seeking forfeiture, IC 34-4-30.5-5 gives standing to seek forfeiture to the attorney general and persons classed as "aggrieved persons." As a practical matter, actions for forfeiture will accompany any criminal proceeding either before or after conviction.

casions the same day. Thus, the entire "pattern" could be based upon one misjudgment by the seller of whether a particular item is lawful. Given the practical difficulties of defending RICO allegations, as well as the natural desire to avoid the risk of having to do so, it is obvious that there will be massive self-censorship by persons dealing in protected material.

Thus, petitioner asks this Court to analyze the RICO statute as applied to obscenity from the perspective of its impact upon first amendment rights.

II

THE USE OF OBSCENITY OFFENSES, OTHER THAN CHILD PORNOGRAPHY, AS PREDICATE OFFENSES OF RICO, UNDER THE INDIANA RICO STATUTE VIOLATES THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

RICO was created to deal with the perceived impact of "organized crime." The Indiana RICO statute was modeled after the Federal statute but uses somewhat different predicate offenses. Included in the predicate offenses is any violation of IC 35-49-1 which defines obscenity and obscenity related offenses.[5]

Much is made of so-called "organized crime's" alleged ties to the production and distribution of sexually explicit

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[5]The possible range of predicate offenses under IC 35-49-3 includes the importation into Indiana and sale or distribution within Indiana of obscene matter. Also, display or distribution of matter "harmful to minors" may be a predicate offense. Under some statutory provisions, a minor need not actually see the offensive material. IC 35-49-3-3 (2) and (3).

material. Attorney General's Commission on Pornography, *Final Report*, (July, 1986). In order to combat this perceived vice, the Indiana legislature and others have resorted to the unconstitutional tactic of suppressing speech by calling it "racketeering." Labeling speech "racketeering" or "Nazi" or "communist" does not strip it of its first amendment protection. *DeJonge v. Oregon*, 299 U.S. 353 (1936); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied* 439 U.S. 916 (1978).

If, indeed, crimes other than obscenity are being committed in the production and distribution of erotic material, there are numerous criminal statutes, including RICO, which can be employed by state and local authorities to stop that conduct. *See, e.g., United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982).[6]

The justification advanced for including obscenity as a predicate offense of RICO is the elimination of businesses that have engaged in some unlawful speech in the past. Attorney General's Commission on Pornography, *Final Report*, (July, 1986) at 435, 498. Indeed, the primary goal of RICO is the elimination of certain enterprises. *Russello v. United States*, 464 U.S. 28 (1983). While this goal may be laudable in other circumstances, as applied to businesses

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[6]*Thevis* involved the RICO prosecution of the owner of a group of corporations whose purpose was the distribution of adult books and films. The predicate offenses were murder and arson. Other non-speech predicate offenses in Indiana may include tax violations, securities fraud, and theft, to name a few.

Under Federal law, prohibitions against kidnapping, 18 U.S.C. § 1201, the "Mann" act, 18 U.S.C. § 2421 *et seq.*, tax violations and child pornography, 18 U.S.C. § 2251, are among the panoply of Federal offenses which provide adequate protection against non-speech criminal behavior.

whose sole function is communicative it threatens the very core of first amendment protections.

Other than offenses involving child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), obscenity offenses are conceptually different from any other crime. The conceptual differences are a result of the fact that virtually all works are presumed permissible. Thus a particular work is not illegal until a jury finds it obscene. This conceptual difference also prevents the wholesale seizure of books, magazines, and movies on the theory that they are contraband. *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Roaden v. Kentucky*, 413 U.S. 496 (1973). The conceptual differences arise from the "fine line which separates the obscene from the protected" and the desire to ensure full distribution of protected material. *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963). Also, unlike a crime such as theft, where the citizens' proper motto is: "when in doubt, don't," the first amendment allows, indeed encourages, citizens to take risks, to challenge the majority and to create discomfort. *Collin v. Smith*, *supra*, at 1206; citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949).

Organizations which deal in the distribution of books, movies and magazines, with no other accompanying illegal activity, are much different than organizations which deal in drugs, murder, theft, or stock fraud. This difference is a product of the protection given to their communicative functions. Should a distributor err, and sell obscene matter, the first amendment historically has not al-

lowed the suppression of future speech or the destruction of the errant company. *Near v. Minnesota*, 283 U.S. 697 (1931); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980).

Thus, Sappenfield submits that obscenity cannot constitutionally be a predicate offense of RICO because of the resulting impact upon first amendment rights. This Court has often held that statutes regulating speech must be carefully tailored. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Such statutes must be finely drawn and require the use of sensitive tools to discern and enforce the boundary between protected and unprotected speech. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Carroll v. Commissioners*, 393 U.S. 175 (1968).

Conceptually, and in application, RICO was not intended as a sensitive tool. It is intended as judicial "heavy artillery" in the "war on crime." Given the practical difficulty of preventing improper conviction, *see, e.g., Jenkins v. Georgia*, 418 U.S. 153 (1974); *United States v. Thevis*, 526 F.2d 989 (5th Cir. 1976); *Shealy v. State*, 675 S.W.2d 215 (Tex. Ct. App. 1984), and repeated attempts at prosecution of mainstream non obscene items, e.g., *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (1980), this weapon should not be applied to speech related offenses. *Penthouse International, Ltd. v. McAuliffe, supra* is particularly instructive because it demonstrates, by inference, the manner in which the mere threat of RICO could be abused by an aggressive prosecutor. There, a local prosecutor brought obscenity charges against persons selling such magazines as *Penthouse* and *Playboy* in convenience food and drugstores and the Atlanta In-

ternational Airport. Also arrested was the president of a local distributor of the magazines. *Penthouse, supra,* at 1358, 1359. The district court had found that the actions of the prosecutor created an informal, impermissible prior restraint. *Penthouse International, Ltd. v. McAuliffe,* 436 F.Supp. 1241, 1256 (N.D. Ga. 1977). The court of appeals noted that the procedure enforced by the prosecutor was a "calculated scheme" which included public announcements, visits, and carefully timed arrests, which effected a constructive seizure of protected material. *Penthouse* at 1360. The court held that the prosecutor's policies were an impermissible system of prior restraint, in violation of the Constitution. *Penthouse* at 1362. In so holding, the court of appeals pointed to this Court's willingness to look beyond the form of a transaction and examine its substance. The court of appeals noted that "threats of prosecution or of license revocations have been enjoined in several cases." *Penthouse* at 1360 citing *Bantam Books, Inc. v. Sullivan, supra.* Sappenfield submits that the informal restraint and prior restraint condemned in *Penthouse* is not as significant as that which is effected by the threat of RICO.

Indeed, the facts of *4447 Corporation v. Goldsmith,* (87-740) clearly demonstrate the power which the mere threat of RICO gives a prosecutor when obscenity is a predicate offense. There, the prosecutor was able to obtain, *ex parte,* an order permitting seizure and closure of businesses, based upon mere accusations that the businesses sold sexually explicit material. No business selling protected material will risk offending a prosecuting official when a possible error in judgment means the effective death of the business.

This Court must reconize that prosecutors have occasionaly resorted to harassment of first amendment activity in order to achieve their goals. *Penthouse, supra.* A weapon such as RICO makes improper harassment easier because of the severity of its sanctions. The threat of RICO could allow an aggressive prosecutor to act as a *de facto* censor for an entire community.

Sappenfield submits that RICO cannot be applied to obscenity with the necessary regard for first amendment protections. Nor can it be modified to allow the necessary sensitivity and still serve its intended function. The impact of RICO, as applied to the predicate offense of obscenity under the Indiana statutory scheme, is so severe that its application to materials or offenses other than child pornography simply can not be accomplished with the necessary sensitivity to first amendment rights. *Speiser v. Randall, supra.*

III

THE INDIANA RICO STATUTE USING OBSCENITY AND OBSCENITY RELATED OFFENSES AS PREDICATE OFFENSES IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE, IN VIOLATION OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

In order to meet constitutional standards, a law must give persons of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Vague laws which deal with protected material have a "chilling effect" which forces distributors

to engage in self-censorship in order to avoid the risk of breaking the law. Vague or overbroad laws also suffer from the vice that they permit a "standardless sweep" that allows policemen, prosecutors, and juries to pursue their personal predilections. *Kolender v. Lawson,* 461 U.S. 352 (1983). As applied to businesses selling items protected by the first amendment, IC 35-45-6-2 fails. By using obscenity or obscenity related offenses as predicates, the Indiana RICO law becomes impermissibly vague and overbroad. Its vagueness creates an unprecedented chilling effect which renders the law unconstitutional.

A) Both The Definition Of Obscenity Under Miller v. California, 413 U.S. 15 (1973), And The Indiana Courts' Application Of It Contribute To The Overbreadth And Vagueness Of The Indiana RICO Statute Using Obscenity As A Predicate Offense.

Before turning to the portions of the RICO statute which render it unconstitutional as applied to obscenity offenses, Sappenfield notes that the vagueness of the legal test of obscenity contributes significantly to the overall vagueness of the RICO statute as applied to obscenity.

Sappenfield will not review the history of this Court's struggle to define obscenity. Nor will petitioner review the periodic criticism of the *Miller* standard launched by many commentators, lower court judges and, indeed, members of this Court. *See, e.g., Pope v. Illinois,* — U.S. —, 107 S.Ct. 1918 (1987). Analysis of the decisions of this Court and lower courts reveals that the *Miller* standard is notably inexact.

The definitional terms; "contemporary community standards," "purient interest," "patently offensive," and "serious value;" are so amorphous that the line between communications which are protected and those which are not is often too blurred to identify criminal conduct. *Smith v. United States*, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting).

The inherent vagueness of the *Miller* standard is compounded by the gloss placed upon it by the Indiana Supreme and Appellate Courts. In *Sedelbauer v. State*, 428 N.E.2d 206 (1981),[7] the Indiana Supreme Court held that the manner in which a particular subject is displayed will affect whether the material may be judged obscene. The court, speaking through its chief justice held:

> It is not the subject matter that is obscene in any situation, it is the manner in which the subject matter is presented that constitutes obscenity. For instance, a nude model may be presented to an art class to aid in the instruction of the students as to how to depict the nude human form. The model may be presented in a wholly acceptable manner and not be considered as lewd or obscene. However, one could take that same model and by a slight change in pose *and setting* transform that same person into a lewd and obscene object. The difference would be readily discernible to any member of society.
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> 428 N.E.2d at 208 (emphasis added)

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[7] *Sedelbauer v. State*, involved the prosecution of a bookstore employee for distribution of obscene matter. The appellate court described him as one whose "only act was to recite the price of the films when asked by the undercover vice squad officers." *Sedelbauer v. State*, 402 N.E.2d 1006 (Ind.Ct.App. 1980).

This gloss, a substantial deviation from *Miller,* is of great significance. In a RICO/obscenity trial, Indiana juries may consider, as evidence of obscenity, the fact that a business is an "adult bookstore." This deviation allows, indeed, encourages, *ad hoc,* unguided decisions by juries. Indiana citizens face an inherently unfair situation in which non obscene work may become obscene solely because of the name given to the store in which it is sold.

Thus, at least in Indiana, those wishing to determine if a particular work "crosses the line" must somehow *know*:

(1) The communty standards of a particular county at that point in time,

(2) Whether material appeals to a normal interest in sex,

(3) The acceptable level for depiction of sex in a particular county at that time,

(4) Whether or not the work has "serious value," and,

(5) Whether the setting and manner of the sale or presentation is "appropriate."

To make the decision whether or not to sell a particular item, the business owner, and indeed the clerks who work for him, must have the skills of a psychologist, sociologist, anthropologist, media critic, art critic, educator, and environmental expert. Petitioner submits that the skills of a clairvoyant would perhaps be most helpful.

The distributor of books, magazines, and movies is faced with the virtually impossible task of discerning at what point he may be violating the law. Under these cir-

cumstances, the only safe course of action is to avoid distribution of *any* controversial material.

Conversely, a prosecutor has a whole range of subjective criteria upon which to base a decision to prosecute, including the setting of a particular sale.[8] Thus, the situation contains the lack of precision and the capacity for prosecutorial overreaching which are inherent in a vague law.

This inherent lack of precision may well be acceptable in a misdemeanor law carrying relatively minor penalties. *cf. Kolender v. Lawson, supra.* However, when it is used as the basis of prosecution which could carry over twenty years of imprisonment, substantial fines, and forfeitures, then its alleged utility is far outweighed by the adverse impact and chilling effect the law places upon constitutionally protected rights.

B) The Indiana RICO Statute, Using Obscenity As A Predicate Offense, Is Overbroad And Vague Because Of Its Enormous Scope And The Resulting Chilling Effect Upon Free Speech.

C) The Minimal Requirement Of "Participation In" A RICO "Enterprise" When Obscenity Is A Predicate Offense, Under The Indiana Statute, Contributes To The Unconstitutional Vagueness And Overbreadth Of The Indiana RICO Statute Using Obscenity As A Predicate Offense.

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[8]Other than his conscience, there is little to prevent a prosecutor from concluding, in good faith, that a particular magazine or book meets the *Miller* test. *See, e.g., Penthouse v. McAuliffe, supra; Jenkins v. Georgia, supra; United States v. Head,* 317 F.Supp. 1138 (E.D. La. 1970).

The chilling effect of the obscenity definition increases to frightening proportions when combined with IC 35-45-6-2.

Under this statute, one who

(1) Knowingly *or* intentionally receives proceeds, directly *or indirectly* from a violation of 35-49-3 (obscenity) and who buys real estate or owns or operates a business

or

(2) Through violation of IC 35-49-3 (obscenity) and who buys real estate or owns or operates a business

may be guilty.

While IC 35-45-6-2(1) and (2) have an overly broad sweep, the impact of IC 35-45-6-2(3) is astounding. Because "pattern of racketeering" includes those who aid, abet and conspire, subsection (3) punishes anyone who is:

associated with or *employed* by a business and who directly or indirectly participates in that business by committing or *assisting* or conspiring in the commission of an obscenity offense.

The statute thus makes criminal, activities which are completely lawful unless undertaken in conjunction with a business selling communicative materials.

The potential reach of the statute is obvious. Section one of the statute makes it illegal for a leasing company to obtain rent from a business which "crosses" the line and sells obscene matter. Those who sell utilities, or provide any one of the host of services which modern business requires, to adult stores selling sexually explicit ma-

terials come under the statute's sweep pursuant to section three.

For example, Fantasy I & II openly sell erotic material. Any landlord, salesperson, or clerk who might rent to them, sell them products, or work there, would know the nature of the business and the types of items offered for sale. Any rent payments, payments for goods, or a paycheck could be proceeds derived from the sale of obscene material. If the recipient should deposit those proceeds in his business account or his personal account, he could be liable under the statute, thereby facing imprisonment and forfeiture.

Those who provide necessary services to petitioner, knowing the nature of his business, could be charged under the theory that they are aiding and abetting the commission of obscenity offenses. Employees may be direct violators or conspirators. The statute clearly reaches not only those who own lawful businesses but individuals who work there, the innocent landlord and the incidental providers of necessary services.

This interpretation is not tortured. In *4447 Corporation v. Goldsmith, supra,* (the companion in the Indiana Supreme Court to case 87-470 in this Court), the prosecutor sued the landlord and obtained, and continues to have injunctive relief in the form of the complete closure of his property to new, unrelated tenants. These circumstances are detailed in the *Amicus Brief of Burke Mendenhall, Ft. Wayne Books v. Indiana,* 87-470. The experience of Mendenhall demonstrates that the law is subject to the arbitrary and discriminatory enforcement which is the hallmark of a vague or overbroad law. *Grayned, supra; Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

D) The Inherent Vagueness And The Resulting Chilling Effect Of RICO, As Applied To Obscenity Offenses Is Compounded By The Minimal Scienter Required For Criminal Liability By The Indiana Courts.

IC 35-49-3 (obscenity) has been held to require knowledge *only* to the extent that one have knowledge of the *general* nature of the business and the materials offered, i.e. "X-rated." *Richards v. State*, 461 N.E.2d 744 (Ind. App. 3 Dist. 1984); *Sedelbauer v. State, supra.*

For example, in *Sedelbauer v. State, supra,* the Indiana Supreme Court held that knowledge of the general character of the items offered for sale provided the necessary knowledge required by *Smith v. California,* 361 U.S. 147 (1959).

The Indiana Supreme Court stated:

> Appellant next asks the question, "Is the evidence constitutionally sufficient to support a finding of scienter, where the defendant did not know the nature and character of the contents of the material sold?" This question by the appellant borders on the ludicrous. Any adult human being who could pick up the packages, above described, and sell them to a customer in a store, as above described, would indeed be out of touch with reality if he did not know and understand the nature of the object he was selling. *Sedelbauer,* 428 N.E.2d at 210.

Thus, knowledge of the nature of the products the business offers (erotic material) apparently satisfies the requirement of scienter.[9]

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[9]State and Federal courts apply the scienter concept differently. Some require proof of actual knowledge of the contents of a film. *See, e.g., Shealy v. State, supra.* Others, like Indiana, allow constructive knowledge.

This is constitutionally deficient because merely knowing that one deals in erotic material cannot provide knowledge that a particular item is legally obscene or that there have been multiple violations of the obscenity law. Such constructive knowledge must have a significant impact upon first amendment rights.

In *Smith v. California, supra* at 153 and 154, the court held:

> *By dispensing with any requirement of knowledge of contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter.* For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omni-science.' [citations omitted]. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. *The*

> *bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.* Through it, the distribution of all books, both obscene and not obscene, would be impeded.

(Footnotes omitted and emphasis added.)

The self censorship condemned in *Smith* pales compared to the self-censorship which will be imposed under the Indiana statute. Each provider of services, the telephone company, water company, cleaning services, bookkeepers, each landlord, and each clerk will have a manifest need to ensure that only the *least* controversial materials are offered for sale. It is not difficult to imagine that the landlord or yellow pages representative might say, "I won't sell or rent to you if you sell any 'X' rated, or 'R' rated material."

When the vagueness of the line between protected and unprotected speech is coupled with the minimal concept of "participation in" a racketeering enterprise and the minimal "knowledge" requirement, an insurmountable burden is placed upon those who sell sexually explicit material. If the distributor were facing a severe prison sentence only, there would be a significant chilling effect which would render the RICO/obscenity combination unconstitutional. When the forfeiture and seizure provisions are added, the unconstitutional nature of the RICO approach to obscenity is readily apparent.

The Indiana RICO action is premised on two predicate acts. Sale or display of the same item at two times on the same day is sufficient. If a jury concludes that the items are obscene, no other real proof of the "pattern of racketeering activity" is necessary.

It is clear that this law may be used, not only to prevent the sale and exhibition of materials by "racketeers," but also to chill and discourage any persons from distributing sexually explicit materials, including those which are constitutionally protected.

Because of the severe penalties for guessing wrong, no business will accept the risk of continuing to display or distribute explicit material. Thus, Indiana has created an irreversible, insidious, prior restraint by virtue of the existence of the RICO statute in its present form as applied to allegedly obscene materials.

The RICO statute was created to pursue racketeers. In its present form, it has been, can and will continue to be applied to "Mom & Pop" enterprises whose only "crime" is to sell or display sexually explicit material. This is a threat to first amendment freedoms which this Court must not tolerate.

IV

IF THE INDIANA RICO STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD, THEN THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT PREDICATE OBSCENITY OFFENSES MUST BE AFFIRMED CONVICTIONS ON SUCCESSIVE DATES ARISING FROM ACTS COMMITTED IN THE SAME JURISDICTION AS THAT WHERE THE RICO CHARGE IS BROUGHT.

Sappenfield submits that, if obscenity can properly be a predicate offense of RICO, and, if the Indiana RICO act as applied to obscenity is not impermissibly vague and overbroad, then specific safeguards must be employed to ensure that the requisite sensitivity exists to render the statute constitutional.

Foremost among the necessary safeguards is a requirement that predicate offenses be in the form of prior, properly obtained convictions where the second offense occurs after the first conviction and where a third "RICO triggering act" occurs after the second conviction. Sappenfield also submits that *all* convictions must arise in the same jurisdiction, for example, Howard County, Indiana.

The reasons for these requirements are obvious. "Contemporary community standards" are, at best, difficult to quantify. Many commentators and cases discuss how difficult they are to determine. Common sense tells us that any measure of community standards will pinpoint those standards only at a given point in time.

RICO was intended to prosecute the indiviuals who, over a substantial period of time, chose to engage in multiple criminal offenses for economic gain. However, unlike those dealing in murder or drugs, those selling books or movies can not *know*, at the time a sale occurs, that a particular item violates contemporary community standards. They may believe, based upon the level of sales or lack of complaints that certain material is acceptable to the community. They may honestly believe, that a given work has "social or artistic value."

The distributor will have guidance *only* when a jury properly composed and instructed, and having heard all relevant evidence, returns its verdict. However, that ver-

dict will reveal public attitudes only at a given point in time. Because of the breadth given first amendment rights, one should have the right to continue "testing the waters." Thus, a second criminal distribution and conviction is necessary before the authorities can have some reasonable belief that the organization is unwilling to comply with the standards of a given community. Only with this knowledge and a third alleged violation should authorities be allowed to unleash RICO.

Because community standards may vary from location to location, only trial convictions based upon the community standards of a particular jurisdiction may be utilized as predicate offenses. It is unfair for a jury in Howard County to use alleged violations of the standards of LaPorte County in judging whether Sappenfield has violated the community standards of Howard County.

Similarly, guilty pleas by individuals with no ownership interest in a business, clerks, for example, cannot serve as predicate convictions. Non-owners simply do not have the requisite interest in litigating the first amendment values of a work that the owners of a business have. A guilty plea, especially that of a clerk, may be based upon many considerations, the least of which is whether a particular book, magazine or movie is obscene. Therefore, only an affirmed trial conviction for obscenity can constitutionally serve as a predicate for a RICO charge.

V

IF THE INDIANA RICO STATUTE, USING OBSCENITY AS A PREDICATE OFFENSE, IS NOT VAGUE AND OVERBROAD, THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT THERE BE A FULL, PROMPT ADVERSARY HEARING FOCUSING UPON THE ALLEGED OBSCENITY OF ITEMS CONSTITUTING THE ALLEGED PREDICATE ACTS. THE BURDEN OF PROOF AT THIS HEARING MUST BE GREATER THAN "PROBABLE CAUSE".

Under Indiana law, a person arrested for a misdemeanor obscenity offense is entitled to a hearing on the probable obscenity of items seized. IC 35-49-2-4.[10] However, when one is arrested on a warrant for a felony, issued by a court of proper jurisdiction, one is not entitled to a hearing on the issue of probable cause. *Remsen v. State*, 495 N.E. 2d 184, 189 (Ind. 1986); *Poindexter v. State*, 374 N.E. 2d 509, 513 (Ind. 1978). Thus, in Indiana, one arrested for RICO with obscenity predicate offenses is not entitled to the required prompt judicial determination of probable obscenity in an adversary proceeding as required by *Heller v. New York*, 413 U.S. 483 (1983) and allowed by the statute. The constitutional harm is obvious. Given the threat to protected rights the RICO accusation

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[10]It is unclear what the practical effect of this hearing is in Indiana. Petitioner is advised that in two cases in Lake County, Indiana, *Senneca Products v. State*, 3C8611250 (Lake County Court, Div. 3) and *Allied News, Inc. v. State*, 2C871850 (Lake County Court, Div. 2) the court found that items seized were probably not obscene. Notwithstanding this finding, the court and the prosecutor refused to dismiss the case. In an unpublished order, the Indiana Court of Appeals refused to hear an interlocutory appeal. Both cases remain pending.

creates, a defendant must have the right to litigate the probable obscenity at the earliest possible moment. Nothing less will satisfy the command of the first amendment.

Moreover, at said hearing, a court constitutionally must be required to utilize a standard more burdensome than "probable cause." Minimally, the "clear and convincing" standard is constitutionally required. *California ex rel. Cooper v. Mitchell Brothers,* 454 U.S. 90 (1981). However, given the interests at stake and the magnitude of the threat to protected speech, a non-binding finding by the judge of obscenity "beyond a reasonable doubt" may be required. *McKinney v. Alabama,* 424 U.S. 669, 678 (1976) (Brennan, J., concurring).

CONCLUSION

Throughout the 1970's and 1980's, there has been a dramatic increase in national and local community acceptance of sexually explicit material. Much is now shown on "network" or cable television which previously would have been deemed patently offensive. There has been a corresponding increase in the availability and consumption of sexually explicit books, magazines, and video tapes.

What was shocking or obscene years ago, for example, *Lady Chatterly's Lover,* is now considered a work of art.

Some argue that "pornography" is a four billion dollar industry which must be destroyed. A converse argument may be made that the level of expenditures demonstrate wide spread national satisfaction with the ready availability to adults of sexually explicit material.

The increasing use of RICO, in a criminal setting as applied to obscenity and obscenity related offenses, represents perhaps the greatest threat to first amendment rights in the history of the nation. The fear of RICO, its forfeiture and its harsh prison sentences, will simply drive from the marketplace all controversial sexual material. As that, which is now closest to the line, is driven from the market, pressure will increase upon other works. Historically, the appetite of the censor is voracious. Petitioners request the Court to end this threat by reversing the decision of the Indiana Court of Appeals, First District and hold that the Indiana Criminal RICO statute violates the United States Constitution.

Respectfully submitted,

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